No. 339.

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CHARLES ELMORE CROPLEY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1949

IN THE MATTER OF THE PETITION OF LEE KAMEN,
FOR A WRIT OF HABEAS CORPUS,
PETITIONER,

vs.

ROBERT GRAY, SHERIFF OF SEDGWICK COUNTY, KANSAS,
RESPONDENT.

REPLY OF PETITIONER TO BRIEF OF RESPONDENT, ROBERT S. GRAY.

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MAY IT PLEASE THE COURT:

Your petitioner, Lee Kamen, for his reply to the brief of respondent herein, respectfully shows this Honorable Court:

A. SUPPLEMENTAL STATEMENT.

In the Court below, one of the grounds relied upon and set out in the petition for Writ of Habeas Corpus is that petitioner's imprisonment is unlawful and that he

is being deprived of his liberty in violation of the Fourteenth Amendment to the Constitution of the United States (Abstract 2).

The Supreme Court of the State of Kansas recognized the claim of petitioner to the effect that he is being deprived of his liberty in violation of the Federal Constitution, but notwithstanding said claim, the petition for the writ was denied on the ground that said petitioner had waived his Constitutional right of jeopardy. (Kamen v. Gray, 169 Kan. 664, 665, 669, 220 P. 2d 160).

B. ADDITIONAL JURISDICTIONAL STATEMENT.

The Kansas Court has decided a Federal question relating to jeopardy in violation of rights under the Fourteenth Amendment not heretofore determined by the Supreme Court of the United States and therefore review on Writ of Certiorari should be granted.

C. ADDITION TO QUESTION HERETOFORE PRESENTED.

Where a defendant has been placed upon trial before a jury, upon an information sufficient to sustain a criminal conviction, and the State introduces its evidence and rests, and thereupon a motion by said defendant for a directed verdict and discharge is argued and the trial Court, in lieu of ruling upon said motion, declares a mistrial and discharges the jury on the ground that incompetent evidence has been introduced by the State, is a further and second prosecution, based upon a new information, for the same offense, barred under the due

process clause of the Fourteenth Amendment to the Constitution of the United States?

D. ADDITIONAL REASON RELIED ON FOR ALLOWANCE OF WRIT.

Petitioner is being denied the benefit of his plea of former jeopardy contrary to the United States Constitution, Fourteenth Amendment.

E. ARGUMENT AND AUTHORITIES.

Preliminarily we desire to state that petitioner is fully cognizant of the fact that a review on Writ of Certiorari is not a matter of right but of sound judicial discretion and is granted only where there are special and important reasons therefor.

We do not wish to repeat what has been argued heretofore, however, by reason of the divided opinion of the Kansas Court and of the authorities and argument heretofore presented, and which we herein present, we submit that there is good reason for an order granting certiorari in this case.

Notwithstanding the decisions of Federal Circuit Courts, Federal District Courts and the Courts of the various states on the questions presented, the decisions of this Court only (Supreme Court of the United States) are determinative of our right of review, as we understand the law.

I. JURISDICTION BY REASON OF CLAIM OF IMMUNITY OF ARTICLE V OF AMENDMENTS TO THE FEDERAL CONSTITUTION.

On the question of the applicability of Article V of Amendments to the Federal Constitution, and immunity from a second trial claimed thereunder, attention is called to the case of Bohanan v. Nebraska, 118 U. S. 231, 30 L. ed. 71. It is to be noted that in that case the Court held that where immunity from a second trial is specially set up under Article V of Amendments, the Supreme Court of the United States has jurisdiction to review that decision.

In Bohanan v. Nebraska the plaintiff, in error, was indicted in a State Court of Nebraska, charged with murder in the first degree. Upon trial, he was convicted of murder in the second degree. The Supreme Court of Nebraska awarded him a new trial. When his case was remanded to the lower Court, he was again placed on trial on the same indictment. To this indictment plaintiff, in error, filed a plea of autrefois acquit, as to the charge of murder in the first degree, setting forth the facts of his previous conviction, on said indictment, of murder in the second degree. This plea was adjudged bad by the trial Court, for the reason that the former judgment had been set aside at the instance of the plaintiff in error. The question was again presented to the trial Court, by way of a request for an instruction to the jury to the effect that, by reason of the previous acquittal, they could not convict the accused of murder in the first degree, which instruction was refused; where-

upon the jury convicted this plaintiff in error o f murder in the first degree and the Court sentenced h im to be hanged. This cause was again taken to the Supreme Court of Nebraska, and these rulings, with othe r matters, assigned as errors, but the judgment of the lo wer Court was by the Supreme Court affirmed; whereup on a writ of error was sued out.

One of the assignments of error in the petitio n in error before the Supreme Court of the State of Neb raska was as follows:

> "The said court erred in putting the sa id defendant twice in jeopardy for the same offens e in violation of and in disregard of Article V of the Amend ments to the Constitution of the United St ates, which provides: 'Nor shall any person be subj ect for the same offense to be twice put in jeopar dy of life and limb'."

In deciding the above case, it was held tha t immunity from a second trial for the same offense by reason of the Article V of the Amendments to the Constitu tion of the United States having been set up and the sa me having been denied defendant by the judgment of th e Supreme Court of the State, the Supreme Court of the United States had jurisdiction to review that decisi on, the syllabus in connection therewith being as follow s:

> "The Supreme Court of a State havi ng denied a claim of immunity specially set up unde r Article V of the Amendments to the Federal Const itution, this Court has jurisdiction to review that de cision."

We find no other decisions of this Court on the question and by reason of the holding of the Court in that case, we submit that jurisdiction herein is not lacking.

II. JURISDICTION BY REASON OF HAVING BEEN PLACED IN JEOPARDY FOR THE SAME OFFENSE IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION.

On the question of a right of review based upon petitioner's having been twice placed in jeopardy for the same offense in violation of the Constitutional right afforded by the Fourteenth Amendment to the Constitution of the United States, attention is directed to the case of Keerl v. Montana, 213 U. S. 135, 53 L. ed. 734. There the Court held:

> "A specific contention on the trial of a criminal cause in a state court, that the denial to the accused of the benefit of his plea of former jeopardy operates to deprive him of his liberty without due process of law, contrary to U. S. Const. 14th Amend., raises a Federal question which will sustain a writ of error from the Federal Supreme Court to review the judgment of the highest court of the state, affirming the conviction below."

It is to be noted that in Keerl v. Montana, supra, the Court held that jeopardy had not attached and did not, as a result, decide the question of whether the Fourteenth Amendment in itself forbids a State from putting one of its citizens in second jeopardy. From our search, we fail to find a case in which this Court has directly passed upon the question.

Respondent cites the case of Amrine v. Tines, 131 F. 2d 827, (C. C. A. 10). This case is directly contra to

the holding in Ex parte Ulrich, 42 F. 587, where the Court there held:

> "Since it is a principle of the common law that no one shall be twice placed in jeopardy for the same offense, the trial and commitment of one who has already been tried and acquitted of the same offense is depriving him of his liberty 'without due process of law', within the meaning of Const. U. S. Amend. 14."

Since the question does not appear to have been decided and further since petitioner has contended and now contends that the denial to him of his plea of former jeopardy operates to deprive him of his liberty without due process of law contrary to the United States Constitution, Fourteenth Amendment, we submit that this Court has jurisdiction and that a Federal question is presented which gives right to review on Writ of Certiorari.

III. THE QUESTION OF WAIVER OF CONSTITUTIONAL RIGHT OF JEOPARDY.

Notwithstanding our argument heretofore presented on the question of waiver, we desire to briefly comment further.

The Kansas Court, in deciding the case from which this petition for Writ of Certiorari is sought, stated and held that petitioner had waived his Constitutional right of jeopardy. In this connection, the Court said: "It is our conclusion that the petitioner, by his request for the Court to declare a mistrial, waived his Constitutional right of jeopardy, if such existed, after the jury

was empanelled and sworn." (Kamen v. Gray, 169 Kan. 664, 66, 220 P. 2d 160.)

If it can be said that the Constitutional protection invoked by petitioner was denied by the Kansas Court on non-federal grounds, we submit that it still is within the province of the Supreme Court of the United States to inquire whether the decision of the state Court rests upon a fair or substantial basis.

In point is the case of Broad R. P. Co. v. South Carolina, ex rel. Daniel, 281 U. S. 537, 71 L. ed. 1023. There is was held:

> "Even though the constitutional protection invoked by a party to a suit in a state court be denied by the state court on non-Federal grounds, it is the province of the Supreme Court of the United States to inquire whether the decision of the state court rests upon a fair or substantial basis."

The cases of State v. Stiff, 118 Kan. 208, 234 P. 700; State v. Reynolds, 140 Kan. 269, 36 P. 2d 323; and State v. Arnold, 142 Kan. 589, 50 P. 2d 1008, have heretofore been cited both by petitioner and by respondent. We believe that it will be of help if the factual situations in each of these cases are briefly summarized.

In the case of State v. Stiff, supra, a motion to quash was lodged against the information, which motion was overruled. Thereafter a jury was empanelled and sworn to try the case. The state then asked leave to amend the information and this was denied, however the Court, on reconsideration, then went back and sustained the motion to quash originally filed and discharged the jury.

On a second trial for the same offense, it was held that jeopardy had attached in the first instance.

In the case of State v. Reynolds, supra, after a jury had been empanelled and sworn to try the case, the defendant objected to the introduction of any evidence for the reason that the information in that case failed to state an offense. After due consideration, the Court sustained this objection and the defendant was discharged. On a plea of former jeopardy, it was held that because of the sufficiency of the information and the objection by defendant of the introduction of any testimony thereon that jeopardy had not attached.

In State v. Arnold, supra, a jury was empanelled and sworn and evidence was introduced. After the State had rested, defendant moved for an instructed verdict of not guilty, which motion was sustained and the jury was discharged. Defendant was later charged and convicted on the same evidence under another statute. On the second charge, he pleaded former jeopardy, which the Court held was not available.

We fail to see where the decisions in the case of State v. Reynolds, supra, or the case of State v. Arnold, are in anywise controlling. In the instant case, it is true that a request was made by defendant of the Court to declare a mistrial. This motion, however, was overruled. After the State's evidence was concluded, defendant moved for a directed verdict and discharge. The Court did not pass on this motion, but on the contrary, discharged the jury on the sole ground that evidence had gone to the jury which was incompetent. (A. 23)

It is settled law that error in the admission of evidence which can be cured by instructing the jury to disregard it does not necessitate the discharge of the jury in a criminal prosecution. It was so held in Hopt v. Utah, 120 U. S. 430, 30 L. ed. 708; 7 S. Ct. 614; Oliveros v. State, 120 Ga. 237, 47 S. E. 627.

We submit that after the State had rested its case and petitioner had moved for a directed verdict and discharge, he was entitled, as a matter of right under the law of the State of Kansas and the Constitutional provisions referred to herein, to a ruling of the trial Court on that motion. A denial of that right, petitioner having been placed on trial a second time for the same offense, causes him to be deprived of his liberty and of rights afforded by the Constitution of the United States and for that reason he is entitled to a discharge.

F. CONCLUSION.

By reason of all of the foregoing and of the authorities cited and the matters set out in the petition for Writ of Certiorari filed herein, review on Writ of Certiorari should be granted.

Respectfully submitted,

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